IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS SHARKEY	:	CIVIL ACTION
	:	
v.	:	
	:	
FEDERAL EXPRESS CORPORATION	:	NO. 98-CV-3351

M E M O R A N D U M

Giles, C.J. February____, 2000

This is an action in which Thomas Sharkey ("Sharkey") has asserted federal and state law claims against the Federal Express Corporation ("Federal Express") for alleged wrongful termination. Sharkey raises federal claims under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et seq., and the Age Discrimination in Employment Act ("ADEA"), 42 U.S.C. § 621, et seq.., and state law claims under the Pennsylvania Human Relations Act ("PHRA"), 43 P.S. § 951, et seq. for disability discrimination and Pennsylvania common law for wrongful termination. Before the court is Defendant's unopposed Motion for Summary Judgment as to all claims against it. For the reasons that follow, Defendant's motion is granted.

BACKGROUND

Material Facts

On May 16, 1988, Federal Express hired Sharkey as a courier/NON-DOT. Such a courier drives a company truck to customer sites, and picks up and delivers packages sent by Federal Express' service. Performance of the job requires standing and walking for prolonged periods of time, lifting and carrying objects weighing up to 75 pounds, manipulating up to 150

pounds with assistance, bending, stooping, kneeling, squatting, twisting, turning, climbing, crawling, pushing, pulling, and overhead lifting.

On January 3, 1997, Sharkey was unloading packages from a delivery truck and placing them on a conveyor belt when he started to experience chest pains. Sharkey took a nitroglycerin tablet and then contacted his doctor who instructed him to go to a hospital emergency room. He did so. He was admitted to the hospital on January 3, 1997 and released three days later. On January 14, 1997, Sharkey applied for disability benefits to Federal Express' disability insurance carrier, The John Hancock Insurance Company ("John Hancock"). On February 27, 1997, his physician, Dr. Thomas Santilli ("Dr. Santilli"), completed and returned to John Hancock the necessary physician documentation for Sharkey's claim. On the form, Dr. Santilli stated that Sharkey could return to work but that he could perform no function requiring that he lift anything over 50 pounds.

On March 3, 1997, S. Colin Bayne ("Bayne"), Federal Express' Disability Benefits Manager, wrote Sharkey a letter. In it, Bayne concluded that Sharkey was permanently disabled from performing the essential functions of the courier/NON-DOT job because it required the lifting of 75 pounds. Accordingly, Bayne advised that under Federal Express' Medical Leave of Absence Policy P1-5 ("P1-5"), Sharkey had ninety (90) days within which he could attempt to find another Federal Express job within his medical limitation. Under the policy, failure to find a position could result in termination. On March 9, 1997, Sharkey returned Bayne's March 3rd letter signed on a pre-designated line acknowledging its receipt. He indicated in a pre-printed response portion of the letter that he was unwilling to relocate for a job. On March 10, 1997, Sharkey filed a Workers' Compensation Claim Petition.

Between March 11, 1997 and June 3, 1997, on a weekly basis, Bayne mailed to Sharkey a list of jobs available in the immediate area. Bayne and Sharkey also met eight to ten times to discuss various job opportunities. During some of those meetings, Sharkey inquired about several truck driving jobs. However, Bayne informed Sharkey that his 25-to-50 pound lifting restriction disqualified him for those positions. Sharkey also inquired about a dispatcher job. That job had to be assigned to an employee who had greater entitlement due to greater seniority. He later inquired about a part-time customer service agent job. Sharkey claims that Bayne discouraged him from applying for this post because his disability payments, which were based on full-time pay status, would have ceased upon accepting any part-time employment. Sharkey chose to take Bayne's advice. Sharkey also attempted to qualify for several clerical positions by taking a typing test. However, he scored a "0" on that test and never actually applied for any of those jobs. Sharkey never submitted a necessary written application for any of the positions discussed with Bayne.

On June 3, 1997, Federal Express' Corporate Human Capital Committee ("CHCC") recommended to Bayne that Sharkey be terminated, pursuant to P1-5, because he failed to apply for any position for which he was qualified during the 90-day leave period. The CHCC observed that his unwillingness to relocate geographically had limited his potential job opportunities. On June 6, 1997, Bayne sent Sharkey a letter informing him that, based on the CHCC recommendation, he was being terminated. Sharkey was fifty-two (52) years old at the time of his termination. In support of its motion for summary judgment, Federal Express avers that even Sharkey admits that "it was common knowledge" that termination pursuant to the P1-5 policy is uniformly carried out. (Sharkey Dep. at 190-91).

On June 10, 1997, Sharkey challenged his employment termination under Federal Express' written Guaranteed Fair Treatment Procedure Policy. On June 20, 1997, Thomas Lynch, Managing Director of the Liberty District, affirmed Bayne's decision to terminate Sharkey. On June 23, 1997, Sharkey appealed Lynch's decision. On July 1, 1997, Lynch's decision was affirmed by Federal Express' Vice President for the Southern Region, Scott Bunker. Sharkey appealed Bunker's decision to Federal Express' Appeal Board which is located in Memphis, Tennessee. The Appeal Board upheld the decision to terminate Sharkey.

After exhausting Federal Express' internal appeals process, Sharkey filed a Charge of Discrimination with the Equal Employment Opportunity Committee (the "EEOC") alleging discrimination under both the ADA and the ADEA averring that Federal Express did not find work for him consistent with his 25-to-50 pound lifting restriction on November 18, 1997. On April 3, 1998, the EEOC sent Sharkey a Dismissal and Notice of Rights stating that "based on its investigation and the information provided," it was unable to establish violations of either statute. On June 30, 1998, Sharkey filed the instant action in this court. On January 10, 2000, Federal Express filed a Motion for Summary Judgment on all of the claims against it. Although represented by counsel, Sharkey has not responded to Federal Express' motion.

DISCUSSION

Statement of Jurisdiction

This court has federal question jurisdiction over this matter pursuant to 28 U.S.C. § 1331 as this case arises under the laws of the United States. The court also exercises supplemental jurisdiction over Sharkey's state law claims pursuant to 28 U.S.C. § 1367, as to

which it is agreed Pennsylvania law governs.

Analysis

"When a motion for summary judgment is made and supported as provided in [Fed. R. Civ. P. 56], [the non-moving] party may not rest upon the mere allegations or denials of [his or her] pleading." Fed. R. Civ. P. 56(e). "Once the moving party has attacked whatever record evidence – if any – the nonmoving party purports to rely upon, the burden of production shifts to the nonmoving party, who must either (1) rehabilitate the evidence attacked in the moving party's papers, (2) produce additional evidence showing the existence of a genuine issue for trial as provided in Rule 56(e), or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f)." Celotex v. Catrett, 477 U.S. 317, 333 n.3 (1986). "Summary judgment should be granted if the nonmoving party fails to respond in one or more of these ways, or if, after the nonmoving party responds, the court determines that the moving party has met its ultimate burden of persuading the court that there is no genuine issue of material fact for trial." Id.

I. By Failing to Respond to Federal Express' Motion for Summary Judgment, Sharkey Has Not Provided Evidence That There is a Genuine Issue of Fact for Trial

Rule 56(e) of the Fed. R. Civ. P. makes it clear "that a party cannot rest on the allegations contained in his complaint in opposition to a properly supported summary judgment motion made against him." First Nat'l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253, 288 (1968). However, "[e]ven though Rule 56(e) requires a non-moving party to 'set forth specific facts showing that there is a genuine issue for trial,' it is well-settled that this does not mean "that

a moving party is automatically entitled to summary judgment if the opposing party does not respond." Anchorage Assoc. v. Virgin Islands Bd. Of Tax Review, 922 F.2d 168, 175 (3d Cir. 1990). Accordingly, a district court, before granting a summary judgment motion, must first determine whether summary judgment is appropriate, that is, whether the moving party has shown entitlement to judgment as a matter of law.

A. Federal Express Has Established That Sharkey Is Not "Disabled" Under the ADA or PHRA.

Although not obligated to do so, Pennsylvania courts generally interpret the PHRA in accord with its federal counterparts, which include the ADA. Salley v. Circuit City Stores, Inc., 160 F.3d 977, 979 n.1 (3d Cir. 1996). This is primarily because there is substantial similarity between the definition of "handicap or disability" under the PHRA and the definition of "disability" under the ADA. Kelly v. Drexel Univ., 94 F.3d 102, 105 (3d Cir. 1996). Accordingly, this court will analyze both the Plaintiff's ADA and PHRA claims as one under the ADA rubric.

Under the ADA, employers are prohibited from discriminating "against a qualified individual with a disability because of the disability of such individual [with] regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). A "disability" is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual . . ." 42 U.S.C. § 12102(2). In determining what is "major life activity," the Rehabilitation Act regulations provide a representative, but not exhaustive, list. The term is defined as including "functions

such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." Bragdon v. Abbott, 524 U.S. 624, 638-39 (1998); see also 45 C.F.R. § 84.3(j)(2)(ii) (1997); 28 C.F.R. § 41.31(b)(2) (1997).

"Substantially limits" means "[u]nable to perform a major life activity that the average person in the general population can perform," or alternatively, "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778, 782-83 (3d Cir. 1998) (quoting 29 C.F.R. § 1630.2(j)(1)(i)-(ii)). Further, it is provided that a person is "substantially limited in the major life activity of working" if there is a significant restriction in the ability "to perform either a class of jobs or a broad range of jobs in various classes" rather than just a particular job. 29 C.F.R. § 1630.2(j)(3)(i); Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2151 (1999).

In determining whether there has been a substantial limitation on the major life activity of "working," the regulations provide that the district court may consider: "(1) the geographical area to which the individual has reasonable access; (2) the job from which the individual has been disqualified, and the number and types of jobs utilizing similar training, knowledge, skills or abilities from which the individual is also disqualified ('class of jobs'); and/or (3) the job from which the individual has been disqualified, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities from which the individual is also disqualified ('broad range of jobs')." Mondzelewski, 162 F.3d at 783. To be "substantially limited in the major life activity of working, then, one must be precluded from

more than one type of job, a specialized job, or a particular job of choice." Sutton, 119 S. Ct. at 2151. Therefore, "[i]f jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs." Id. "Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs." Id.

Sharkey's claimed impairment is the medical lifting restriction imposed upon him by his doctor subsequent to a heart attack. In light of the fact that there were Federal Express jobs that Sharkey contends that he could have done, he has not proffered any evidence showing how this physical limitation substantially limited the major life activity of working.

Moreover, although the third circuit has yet to rule as such, the district courts of this circuit that have addressed the issue are in agreement that, with regards to working, lifting restrictions of 25 pounds or more are not substantial limitations. See Eible v. Houston, No. CIV.A.96-4655, 1998 WL 303692, at *3 (E.D. Pa. 1998) (noting that 4th and 10th circuits have held that, "as a matter of law," that lifting restriction does not constitute a significant restriction on any major life activity); see also Howell v. Sam's Club, 959 F. Supp. 260, 266 n. 10 (E.D. Pa. 1997) (holding that 25 pound lifting restriction is not substantial limitation). This court follows the reasoning of those cases. Therefore, Sharkey's lifting restriction is not regarded as an impairment that substantially limits the major life activity of work, per se, and Sharkey cannot rest at this stage upon the allegations of ADA violations set forth in his complaint.

The undisputed record shows that Sharkey's lifting "limitation" excluded him only from the particular job of driver/courier. That this job was his job of choice, or the one to which he has grown accustom, is of no legal consequence. Sharkey's training, knowledge, skills, and abilities, despite his physical limitation, qualified him for a broad range of jobs at Federal

Express. Therefore, it cannot be said that his ability to work has been "substantially limited" under the ADA.

Finally, Sharkey has failed to produce any evidence that his physical limitation renders him unable to perform "work" to the level of an average person in the general population, or significantly restricts him as to the condition, manner or duration he can work as compared to the average person in the general population. See Mondzelewski, 162 F.3d at 782-83 (defining "substantial limitation" in terms of inability to perform, and/or having significant restrictions in performing, major life activity as compared to average person).

Because Sharkey has failed to show that his condition has placed "substantial limitations" on his ability to work, he has failed to establish that he is a "disabled" individual under the ADA. Therefore, Federal Express is entitled judgment on Sharkey's ADA claim as a matter of law.

B. Federal Express Has Shown That Sharkey Cannot Establish a Prima Facie ADEA Case.

In order to survive summary judgment, the plaintiff must produce evidence sufficient to convince a reasonable fact-finder as to all of the elements of a prima facie case of discrimination under the ADEA. Showalter v. University of Pittsburgh Medical Center, 190 F.3d 231, 234 (3d Cir. 1999). A prima facie case under the ADEA requires proof that: (i) the plaintiff was a member of the protected class, *i.e.*, was 40 years of age or older, see 29 U.S.C. § 631(a); (ii) the plaintiff was discharged; (iii) the plaintiff was qualified for the job; and (iv) the plaintiff was replaced by a sufficiently younger person to create an inference of age discrimination. Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108 (3d Cir. 1997). If the plaintiff establishes a

prima facie case, "'[t]he burden of production (but not the burden of persuasion) shifts to the defendant, who must then offer evidence that is sufficient, if believed, to support a finding that the defendant had a legitimate, nondiscriminatory reason for the [adverse employment decision].'" Id. An employer need not prove that the proffered reasons actually motivated the termination decision. Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994). If a defendant satisfies this burden, a plaintiff may then survive summary judgment by submitting evidence from which a fact-finder reasonably could either disbelieve the employer's articulated reasons or conclude that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action. Id.

Sharkey has not provided evidence upon which a jury could conclude that Sharkey's termination was the result of age animus. Therefore, he cannot survive summary judgment on his ADEA claim. Sharkey cannot at this stage rely entirely upon the allegation set forth in his complaint that a Federal Express' manager, Joyce Gallagher, once said in a meeting, which Sharkey did not attend, that all drivers over the age of forty (40) should look for a new job. Such a general allegation is insufficient to withstand summary judgment when a defendant articulates in support of a summary judgment motion a legitimate reason for its employment action, as to an individual.

C. Federal Express Has Established That Sharkey Cannot Show Retaliatory Termination.

The Pennsylvania Supreme Court in Shick v. Shirey, 552 Pa. 590, 603 (1998) has held that there is a compelling public policy in favor of protecting an employee who has filed a workers' compensation claim from retaliatory termination. Because there are very few cases

interpreting Shick, there is not, as yet, a "model of proof to use in evaluating claims under it." Alderfer v. NIBCO, Inc., No. CIV.A.98-6654, 1999 WL 956375, at *3 (E.D. Pa. Oct. 19, 1999). However, Sharkey must at least present "affirmative evidence" of retaliation and may not defeat Federal Express' motion for summary judgment by merely averring "unsupported allegations." See Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989) (explaining that summary judgment is warranted when the evidence presents no disagreement so as to require submission to a jury and is so one-sided that one party must prevail as a matter of law.). To make a prima facie case of retaliation under a comparable framework, that is Title VII, the plaintiff must show that: (1) he engaged in protected activity; (2) there was an adverse employment action; and (3) there is a causal relationship between the protected activity and the adverse employment action. Hankins v. City of Philadelphia, 189 F.3d 353, 370 (3d Cir. 1999).

Sharkey has not proffered any evidence that his termination was retaliatory. Sharkey did engage in the protected activity of filing a workers' compensation claim and he was terminated at a point in time subsequent to filing of the claim. However, Federal Express has advanced in support of its motion the non-pretextual reason that Sharkey was terminated consistent with a uniformly administered P1-5 policy. This explanation must be taken as true in the absence of any evidence from Sharkey to the contrary, *i.e.*, that the policy was administered in a way that would permit a reasonable inference of age animus.

Federal Express also contends that the gap in time between Sharkey's termination and his filing the workers' compensation petition suggests that there is no causal link between the two occurrences.

"The mere passage of time is not legally conclusive proof against retaliation."

Robinson v. Southeastern Pennsylvania Transp. Auth., 982 F.2d 892, 894 (3d Cir. 1993). "It is important to emphasize that it is causation, not temporal proximity itself, that is an element of plaintiff's prima facie case, and temporal proximity merely provides an evidentiary basis from which an inference can be drawn." Katchmar v. Sungard Data Sys. Inc., 109 F.3d 173, 178 (3d Cir. 1997). However, if both a significant amount of time has elapsed and the plaintiff does not offer any other evidence supporting a causal link, he has not established the causation element of his prima facie case. See Banner v. Albert Einstein Med. Ctr., CIV.A.No. 94-6722, 1995 WL 262537, at *2 (E. D. Pa. April 27, 1995), aff'd without op., 70 F.3d 1254 (3d Cir. 1995) (finding no causal link where there was a five-month time gap and no other evidence supporting a causal link).

In this case there was a three month gap between the March 10, 1997 filing of Sharkey's workers' compensation claim and his June 6, 1997 termination. Although the time gap does not conclusively negate the inference of causation, Sharkey has failed to provide the court any evidence upon which it could be reasonably inferred that there is a link between the occurrences. Sharkey cannot rely on the mere fact that the adverse employment action occurred after he filed his workers' compensation claim as such is "insufficient to satisfy the plaintiff's burden of demonstrating a causal link between the two events." Robinson v. City of Pittsburgh, 120 F.3d 1286, 1302 (3d Cir. 1997). Given the time lapse between the protected activity and the adverse employment action in this case, Sharkey's burden was to proffer "other evidence supporting a causal link." Dill v. Runyon, CIV.A.No.96-3584, 1997 WL 164275, at *6 (E.D. Pa. Apr. 3, 1997). Sharkey has failed, however, to put any supporting evidence on the record from which a reasonable inference of causation may be drawn. Accordingly, the motion for summary

judgment on Sharkey's retaliation claim must also be granted in favor of Federal Express.

An appropriate Order follows.

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JUDGMENT

AND NOW, this ___ day of February, 2000, upon consideration of the Defendant's Motion for Summary Judgment, for the reasons stated in the attached memorandum, it is hereby ORDERED that Defendant's motion is. Accordingly, JUDGMENT is ENTERED for the Defendant on all of Plaintiff's claims.

BY THE COURT:

_____
JAMES T. GILES C.J.

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to